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IN THE

# Supreme Court of the United States

JEFFREY A. BEARD, ET AL.,

*Petitioners*,

—v.—

GEORGE E. BANKS,

*Respondent*.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

## BRIEF *AMICI CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION, THE ACLU OF PENNSYLVANIA, AND THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT

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## QUESTIONS PRESENTED

I. Does the *Teague* doctrine bar a federal habeas court from entertaining Mr. Banks' claim?

II. If Mr. Banks' claim can be considered, is federal habeas relief barred by 28 U.S.C. §2254(d)?

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## INTEREST OF THE AMICI[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 400,000 members dedicated to the principles of liberty and equality embodied in the Constitution. In support of those principles, the ACLU has appeared before this Court on numerous occasions, both as direct counsel and as *amicus curiae*. The ACLU of Pennsylvania is one of its statewide affiliates. In this case, the United States Court of Appeals for the Third Circuit held that the prisoner, Mr. Banks, was sentenced to death in violation of his Eighth Amendment right against cruel and unusual punishment. The Commissioner of the Pennsylvania Department of Corrections, Mr. Beard, and his *amicus*, the Criminal Justice Legal Foundation, challenge not only the circuit court's conclusion, but its methodology. Accordingly, this case raises issues of fundamental importance to the ACLU and its members about the appropriate rules governing habeas corpus.

The National Association of Criminal Defense Lawyers (NACDL) is a nonprofit corporation with more than 10,000 members nationwide and 28,000 affiliate members in 50 states, including private criminal defense attorneys, public defenders, and law professors. The American Bar Association recognizes the NACDL as an affiliate organization and awards it full representation in the ABA's House of Delegates. The NACDL was founded in 1958 to

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[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3. Pursuant to Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part and no person, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of this brief.

promote criminal-law research, to advance and disseminate knowledge in the area of criminal practice, and to encourage integrity, independence, and expertise among criminal-defense counsel. The NACDL is particularly dedicated to advancing the proper, efficient, and just administration of justice, including issues involving federal habeas corpus. In furtherance of this and its other objectives, the NACDL files approximately 35 *amicus curiae* briefs each year, in this Court and others, addressing a wide variety of criminal-justice issues.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The circuit court below correctly determined that Mr. Banks' Eighth Amendment claim is not foreclosed by *Teague v. Lane*, 489 U.S. 288 (1989); that the Pennsylvania Supreme Court reached an erroneous judgment regarding that claim; and that federal habeas corpus relief is not barred by 28 U.S.C. §2254(d), enacted as part of the Anti-Terrorism and Effective Death Penalty Act of 1996. Those issues are fully addressed in other briefs. To avoid duplication, this brief focuses on the relationship between the *Teague* doctrine and §2254(d), a question that has importance in this case and many others.

The Commissioner, and his *amicus*, the Criminal Justice Legal Foundation (CJLF), ask the Court to embrace an understanding of *Teague* that is incompatible with §2254(d). By their account, *Teague* bars a claim from consideration in federal collateral proceedings unless a state court acted or might have acted unreasonably by rejecting the claim on the merits in the particular circumstances of a prisoner's case. If that were true, the existence of *Teague* would render §2254(d) superfluous.

Section 2254(d) is triggered by a previous state court decision on the merits. In the wake of such a state court



decision, a federal habeas court cannot grant relief to a prisoner solely on the ground that the state court decision was erroneous. The state court decision must also have constituted an unreasonable application of "clearly established Federal law, as determined by the Supreme Court of the United States."[2] Within that formulation, "clearly established" law refers to the rules of law established by this Court's holdings at the time of the state court decision.

According to the Commissioner and his *amicus*, however, *Teague* alone forecloses federal habeas relief with respect to a claim if it would not have been unreasonable for a state court to deny the claim in previous state proceedings.. If that were true, *Teague* would perform the work that Congress has assigned to §2254(d) — and would do so even in the absence of the condition that Congress has specified for withholding federal relief: an *actual* state court decision on the merits. More specifically, the *Teague* doctrine would stop a claim at the door unless it would have been unreasonable for a state court to reject it, whether or not a state court actually *did* reject it. That understanding of *Teague* fights the explicit text of §2254(d).

The Commissioner and his *amicus* resist this Court's efforts to delineate different functions for *Teague* and the statute. The *Teague* doctrine determines whether a claim may be advanced in federal collateral proceedings. It does so by screening claims at the threshold, admitting only claims resting on rules of federal law that existed at the time the prisoner's conviction and sentence became final on direct review. This Court's precedents refer to such a pre-existing

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[2] Under §2254(d), a federal court may also award relief if the state court's decision was "contrary to" relevant holdings of this Court or if it was based on "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." In the interest of simplicity and clarity, we do not address those possibilities in this brief.

rule of law as an "old" rule. The best understanding of what counts as an "old" rule within the meaning of *Teague* is a rule that was clearly established by this Court's holdings at the relevant time.

The *Teague* doctrine and §2254(d) operate from the same baseline: rules of law established by this Court's prior holdings. But *Teague* and the statute refer to those rules of law for different reasons. The *Teague* doctrine lets claims based on rules established by this Court's holdings in the door; the statute determines whether a state court's application of such a rule bars relief.[3] In this case, *Teague* allows consideration of Mr. Banks' claim regarding the way his jury was instructed because that claim fairly rests on the pertinent rule of law established by this Court's holdings when Mr. Banks' sentence was subject to direct review. Since the Pennsylvania Supreme Court rejected Mr. Banks' claim on the merits, §2254(d) comes into play. Yet the statute does not bar federal relief because the state court's application of the "old" rule was unreasonable.

The Commissioner and his *amicus* contend that certain of this Court's descriptions of *Teague* support the argument that *Teague* forecloses federal habeas adjudication unless it would have been unreasonable for a state court to reject a prisoner's claim in the circumstances of the particular case. There are four reasons why those descriptions of *Teague* should not be read to bear that meaning.

First, most of the descriptions of *Teague* on which the Commissioner and his *amicus* rely appeared before §2254(d)

[3] The *Teague* doctrine and §2254(d) focus on this Court's holdings as they were at different times. The *Teague* doctrine works from baseline holdings at the time a prisoner's conviction and sentence became final on direct review. The statute works from holdings at the time a state court rejected a claim on the merits.



was enacted. They have been repeated without re-examination following the statute's passage, but they no longer accurately reflect this Court's decisions identifying the different spheres in which *Teague* and §2254(d) operate.

Second, those descriptions neglect the elaboration of *Teague* in *Wright v. West*, 505 U.S. 277 (1992). Justice Thomas' opinion in that case suggested that *Teague* might implicitly support the proposition that federal habeas courts should defer to reasonable state court decisions applying federal legal standards in particular cases. Yet the Court did not adopt that view. In separate opinions, Justices O'Connor, Kennedy, and Souter explained that *Teague* only ensures that federal courts do not effectively upset state judgments on the basis of changes in the law.

Third, even taken at face value, the descriptions do not have to be read in the way the Commissioner and his *amicus* read them. As described below, they just as easily lend themselves to a quite different interpretation more in keeping with the Court's explanations of *Teague* and §2254(d) in recent cases.

Fourth, the descriptions of *Teague* on which the Commissioner and his *amicus* rely played no significant role in this Court's cases actually deciding whether prisoners were entitled to advance claims in federal collateral proceedings. Instead, the Court invariably examined the rules established by its own relevant holdings to determine whether a claim could be entertained.

## ARGUMENT

### I. SECTION 2254(d) DETERMINES WHETHER A FEDERAL COURT CAN AWARD RELIEF WITH RESPECT TO A CLAIM; THE *TEAGUE* DOCTRINE DETERMINES WHETHER A FEDERAL COURT CAN ENTERTAIN THE CLAIM IN THE FIRST PLACE

The Commissioner and his *amicus* invite the Court to adopt an understanding of the *Teague* doctrine that would have *Teague* eclipse §2254(d). By their account, *Teague* forecloses any claim advanced in federal collateral proceedings unless it would have been unreasonable for a state court to reject the claim at the time the prisoner's conviction and sentence became final. That understanding of *Teague* is flatly inconsistent with Congress' decision, reflected in §2254(d), to attend to the reasonableness of a prior state court decision later—at the stage of a habeas case when the federal court determines whether it can award relief with respect to a claim it regards as meritorious. In explicit terms, §2254(d) specifies that federal habeas relief is barred only if: (1) there is an actual previous state court decision rejecting the claim on the merits; and (2) the prior state court decision was both erroneous and also unreasonable.

This case provides an occasion to differentiate §2254(d) from *Teague*. Over the last eight years, the Court has rendered numerous decisions discussing §2254(d), other provisions of AEDPA, and related features of federal habeas law including *Teague*. Each decision in turn addressed a particular question raised by the Act's interface with the Court's own pre-existing case law. We respectfully submit that it is appropriate now to lay all the pieces to the puzzle on the table at the same time and to fit them together in a coherent whole.



Prior to 1996, it was a matter of debate whether federal habeas corpus should be affected by a reasonable state court decision on the merits of a federal claim. Congress resolved the matter by enacting §2254(d) as part of the Anti-Terrorism and Effective Death Penalty Act. Section 2254(d) directs a federal court's attention to a previous state court adjudication of the merits of a federal claim and instructs the federal court to determine whether that adjudication produced a decision involving "an unreasonable application of. . . clearly established Federal law, as determined by the Supreme Court of the United States." In *Terry Williams v. Taylor*, 529 U.S. 362 (2000), the Court explained that "clearly established" federal law "refers to" the "holdings, as opposed to the dicta, of this Court's decisions as of the time of the relevant state-court decision." *Id.* at 412 (opinion for the Court by O'Connor, J.).

The statute thus instructs a federal court to determine whether a previous state court decision rejecting a claim constituted an unreasonable application of a rule of law established by this Court's then-existing holdings. A federal court undertakes this analysis when it turns to the question whether federal relief can be awarded. In explicit terms, §2254(d) identifies the circumstances under which "[a]n application for a writ of habeas corpus... shall not be *granted*... " (emphasis added). In *Terry Williams*, this Court explained that §2254(d) places "a new constraint on the power of a federal court to *grant* a state prisoner's application for a writ of habeas corpus." *Id.* at 412 (opinion for the Court by O'Connor, J.) (emphasis added).[4]

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[4] The Court has reaffirmed this understanding of §2254(d) on numerous occasions. *E.g.*, *Yarborough v. Gentry*, 124 S.Ct. 1, 4 (2003) (*per curiam*) (stating that if a state court previously rejected a claim a federal court "may *grant relief*" only if the state decision fails one of the tests established by §2254(d)) (emphasis added); *Felker v. Turpin*, 518 U.S. 651, 662 (1996) (stating that §2254(d) "specifies the conditions under

The Court began accounting for §2254(d) and *Teague* in *Terry Williams* and continued the effort in this case when it was here last Term: *Horn v. Banks*, 536 U.S. 266 (2002) (*per curiam*) (*Banks I*). In *Banks I*, the Court explained that the analyses required by §2254(d) and *Teague* are "distinct." *Banks I*, *supra* at 272. With that proposition in place, there must be a way (and there *is* a way) in which the two can be reconciled.

The Court drew the basic distinction between §2254(d) and *Teague* in *Banks I*. By contrast to §2254(d), *Teague* is not addressed to a federal court's authority to grant habeas relief. Instead, the *Teague* doctrine screens claims at the door and determines what claims may pass through for federal consideration. The sequence in which a federal court takes up *Teague* and §2254(d) is plain enough. The *Teague* doctrine comes first as a "threshold" inquiry into the nature of a claim advanced in federal collateral proceedings. *Penry v. Lynaugh*, 492 U.S. 302, 313 (1989). If the respondent properly objects that a claim cannot be considered, a federal court must conduct the *Teague* inquiry "before considering the merits of the claim." *Caspari v. Bohlen*, 510 U.S. 383, 389 (1994). The court turns to §2254(d) only later.

The Commissioner states the "primary question" in this case as the question whether the rule of law linked to *Mills v. Maryland*, 486 U.S. 367 (1988), "can be applied retroactively" to a claim presented in federal collateral proceedings. Brief of Petitioners, at 14. That formulation is misleading. The primary question is not whether a rule reflected in a decision rendered after a prisoner's sentence became final is retrospectively applicable. It is whether the

which . . . *relief* may be *granted*") (emphasis added); *accord Lindh v. Murphy*, 96 F.3d 856, 870 (7th Cir. 1996) (opinion of Easterbrook, J.) (explaining that §2254(d) "does no more than regulate *relief*") (emphasis added), *rev'd on other gr'ds*, 521 U.S. 320 (1997).



rule on which a prisoner relies is "old" for *Teague* purposes and thus enforceable in federal collateral proceedings. See *Sawyer v. Smith*, 497 U.S. 227, 239-40 (1990) (using the "old rule" formulation). If the rule is "old," its application to the case at hand is not retroactive.[5]

The Commissioner's formulation creates the false impression that Mr. Banks is entitled to rely on older holdings only if those holdings established a rule of law that tracked the language in *Mills* verbatim. That is not what *Teague* contemplates at all. The task is not to seize upon a recent decision implementing a rule of law and then to demand that the prisoner identify an older decision stating the rule in precisely the same way. Rather, the task is to "'surve[y] the legal landscape'" as it was when the prisoner's case was still in the direct review channel, to extract from this Court's holdings at that time the rule of law for which they genuinely stood (articulated at the correct level of generality), and then to determine whether a prisoner's claim fairly rests on that rule. *Caspari v. Bohlen*, *supra* at 390 (quoting *Graham v. Collins*, 506 U.S. 461, 468 (1993)).

The Court explained in *Terry Williams* that the "threshold question under AEDPA" is whether a prisoner "seeks to apply a rule of law that was clearly established at the time his state-court conviction became final." *Terry Williams*, *supra* at 390 (Part III of the opinion by Stevens, J.) (joined by O'Connor, Kennedy, Souter, Ginsburg & Breyer, J.J.); see *id.* at 367 n.*. The conclusion of direct review is, of course, the reference point for *Teague*. To determine whether a rule was "clearly established" at that time, the Court turned

[5] A federal court deals with the retroactive reach of a rule only if it first decides that the rule is "new" for *Teague* purposes and turns to the question whether it can be enforced retroactively to cases arriving in federal court in a collateral posture because it fits one of the exceptions to *Teague's* general ban on "new rule" claims.

to its own contemporaneous precedents. The Court "easily" determined that the prisoner's claim could be considered because it was governed by the rule for ineffective-assistance-of-counsel claims established by *Strickland v. Washington*, 466 U.S. 668 (1984). *Terry Williams*, *supra* at 390.

In *Terry Williams*, accordingly, the Court tied an "old" rule for purposes of *Teague* to clearly established law and, in turn, tied clearly established law to rules of law established by this Court's relevant holdings. That understanding of clearly established law within the meaning of *Teague* corresponds to the meaning the Court gave to the same "clearly established Federal law" language in §2254(d). The rule announced in *Strickland* was both an "old" rule for *Teague* purposes (and thus could support a claim in federal habeas) and also clearly established federal law for purposes of §2254(d) (so that the Court was able to rest on it in determining whether relief could be awarded on that claim).

The pieces of the puzzle thus fall into place. The *Teague* analysis can be undertaken as an initial matter and still there will be room for §2254(d)'s restrictions on relief to operate thereafter. At the doorstep, a federal habeas court will determine whether the claim that a prisoner advances rests on an "old" rule (the rule that this Court's holdings established at the time the prisoner's conviction and sentence became final). If so, the claim can be considered, and the court moves to a second question: whether the claim is meritorious (when judged in light of the rule established by those holdings). If the claim is without merit, it can be dismissed on that ground. E.g., *Weeks v. Angelone*, 528 U.S. 225, 237 (2000). If it is meritorious, the court turns to a third question: whether federal relief can be awarded. If a state court previously rejected the claim on the merits, §2254(d) allows the federal court to grant relief only if the state court decision



was not only erroneous, but also unreasonable.[6]

In this case, the *Teague* question is whether Mr. Banks' claim regarding the way the jury in his case was instructed fairly rests on the rule of law established by *Lockett v. Ohio*, 438 U.S. 586 (1978), and related holdings in place when Mr. Banks' sentence was subject to direct review. The *Teague* analysis, then, is essentially a reprise of *Penry*, where the Court examined those same holdings. Mr. Banks' claim *does* rest on the "old" rule established by *Lockett* and its progeny because, "in light of the jury instructions given, the jury was unable to fully consider and give effect to . . . mitigating evidence." *Penry*, *supra* at 315. The question under §2254(d) is whether the Pennsylvania Supreme Court decision rejecting Mr. Banks' claim was unreasonable. It *was* because the state court misapplied the *Lockett* rule to this case and reached the unreasonable conclusion that Mr. Banks' jury was validly instructed.

The Commissioner and his *amicus* misapprehend the different functions performed by the *Teague* doctrine, on the one hand, and §2254(d), on the other. In their view, *Teague* occupies the space that §2254(d) was enacted to fill. Proceeding from that erroneous premise, they are hard pressed to explain what purpose §2254(d) serves with *Teague* already in place. By their account, *Teague* forces a federal court to defer to a reasonable state court decision on the merits of a federal claim, thus obviating Congress' decision to postpone any inquiry into the reasonableness of a prior state court decision until a federal court decides whether it can grant relief.

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[6] In some instances, this Court has skipped over the question whether the state court "erred" and gone immediately to the question whether relief can be awarded. E.g., *Lockyer v. Andrade*, 123 S.Ct. 1166, 1172 (2003).

The CJLF is aware that its conception of *Teague* invites the question whether the enactment of §2254(d) was an idle gesture. Anticipating that question, the CJLF insists that *Teague* "remains important" primarily in cases in which §2254(d) is inapplicable because no state court previously reached a decision on the merits. Brief of Amicus Curiae, CJLF, in support of Petition for Certiorari, at 11. That argument defeats itself. If *Teague* routinely achieves the result that §2254(d) would produce if it were applicable, the question that has to be answered is not whether *Teague* "remains important," but whether the statute has any meaning at all. If the CJLF's account is correct, it makes no difference whether §2254(d) is triggered in a case by a previous state court decision on the merits. The *Teague* doctrine alone bars habeas adjudication if a judgment rejecting a claim was *or might have been* reasonable at the time the prisoner's conviction and sentence became final.[7]

In the alternative, the CJLF attempts to make room for §2254(d) by carving the *Teague* inquiry into two steps. First, according to the CJLF, a federal district court must determine "whether the precedent the petitioner relies on is a new rule." Second, the court must determine the "distinct question" whether an "extension of that precedent" to the case at bar "would be another new rule." Brief of Amicus Curiae, CJLF, at 26. The CJLF admits that, by its own analysis, the second of these "steps" is "subsumed in the

[7] The CJLF also points out that while §2254(d) focuses on the law as it was when a state court adjudicated the merits of a claim, *Teague* "looks to the state of the law at a different date." Brief of Amicus Curiae, CJLF, in support of Petition for Certiorari at 11. That is true enough. See n.3, *supra*. Yet the point only weakens the CJLF's argument. *Because* §2254(d) attaches significance to the law as it was when the state court acted, it can scarcely be doubted that §2254(d), rather than *Teague*, provides the occasion for deferring to a state court decision that was not unreasonable when rendered.



AEDPA [i.e., the §2254(d)] inquiry." *Id.* Evidently, the CJLF contends that the first step is somehow set apart and not "subsumed" into the work assigned to §2254(d). This argument, too, collapses under analysis.

By the CJLF's account, the question contemplated by the first *Teague* "step" is also the same question that §2254(d) asks the federal court to answer. According to the CJLF, a precedent appearing after a prisoner's conviction and sentence became final announced a "new" rule if it arrived at a result that a state court, entertaining the prisoner's claim before the conclusion of direct review, could reasonably have rejected. That, too, is the question that Congress has reserved for the relief stage governed by §2254(d): whether a previous state court decision on the merits was not only erroneous but also unreasonable. The CJLF gets nowhere by positing that a prisoner might seek federal habeas relief on the basis of *two* "new" rules (one reflected in some recent decision and the other necessarily created if the prisoner is successful in the instant case). Either way, the CJLF's definition of what counts as "old" or "new" for *Teague* purposes entails an inquiry into whether a state court acted or might have acted unreasonably by rejecting a prisoner's claim. Either way, that inquiry usurps any role for §2254(d).

This Court may sensibly consider what is to happen in cases (unlike this one) in which §2254(d) is inapplicable for want of a previous state court decision on the merits. The answer is straightforward. If the respondent properly objects that a claim is *Teague*-barred, the court will apply the "old" rule of law that existed when the prisoner's conviction and sentence became final—that is, the rule established by this Court's holdings at that time. And the court will grant relief if, but only if, the prisoner's claim is meritorious in light of that rule.

In this way, the *Teague* doctrine obviously has implications for the availability of federal habeas relief, but only because *Teague* determines whether a claim can be considered in the first place. The *Teague* doctrine does not restrict a federal court's options in the way that §2254(d) would; when *Teague* alone operates, relief can be awarded without a determination that a previous state court decision was unreasonable. Yet *Teague* does accommodate state interests by restricting the federal court's attention to rules of law established by this Court's holdings when the prisoner's case was still subject to direct review.

## II. THE DESCRIPTIONS OF "OLD" AND "NEW" RULES ON WHICH THE COMMISSIONER AND HIS *AMICUS* RELY SHOULD NOT BE READ TO MEAN THAT *TEAGUE* BARS A CLAIM UNLESS IT WOULD HAVE BEEN UNREASONABLE FOR A STATE COURT TO REJECT THE CLAIM AT THE TIME THE PRISONER'S CONVICTION AND SENTENCE BECAME FINAL

The Commissioner and his *amicus* contend that, wholly apart from §2254(d), the *Teague* doctrine instructs federal courts to defer to reasonable state court decisions on the merits of federal claims. In support of their argument, they cite certain descriptions of "old" and "new" rules appearing in this Court's precedents.

In *Teague* itself, the Court said that a "case announces a new rule if the result was not *dictated* by precedent existing at the time the defendant's conviction became final." *Teague*, *supra* at 301 (emphasis in original).[8] In *Butler v. McKellar*, 494 U.S. 407, 415 (1990), the Court said that a case announced a "new" rule because the "outcome" was

[8] *See also Lambrix v. Singletary*, 520 U.S. 518, 527-28 (1997).



"susceptible to debate among reasonable minds."[9] In *Saffle v. Parks*, 494 U.S. 484, 488 (1990), the Court said that a prisoner's claim rests on an "old" rule if "a state court considering [the] claim at the time [the prisoner's] conviction became final would have felt compelled by existing precedent to conclude that the rule [the prisoner] seeks was required by the Constitution."[10] In *Sawyer v. Smith*, 497 U.S. 227, 234 (1990), the Court said that *Teague* "serves to ensure that gradual developments in the law over which reasonable jurists may disagree are not later used to upset the finality of state convictions valid when entered." In *Stringer v. Black*, 503 U.S. 222, 228 (1992), the Court said that a "new rule" can be created if a "prior decision is applied in a novel setting, thereby extending the precedent."

The Commissioner and his *amicus* interpret these descriptions to mean that *Teague* forecloses any claim advanced in federal collateral proceedings, unless there was only one reasonable judgment that a court could reach regarding the claim in the circumstances of the particular case at the time the prisoner's conviction and sentence became final: a judgment in the prisoner's favor. That understanding would dismantle the framework for federal habeas proceedings that Congress enacted in AEDPA. No one would so much as get in the door to advance a claim without first establishing that the claim is so obviously meritorious that no court could reasonably have rejected it when the case was still subject to direct review.

This Court has not conditioned a federal court's authority to entertain a claim on an *a priori* demonstration that the claim is meritorious—and has been meritorious since the petitioner's conviction and sentence became final.

[9] *See also O'Dell v. Netherland*, 521 U.S. 151, 156 (1997).

[10] *See also Graham v. Collins*, 506 U.S. 461, 467 (1993).

Instead, the Court has explained that the threshold *Teague* inquiry occurs "before" the federal court has occasion to consider "the merits." *Caspari v. Bohlen*, *supra* at 383. In *Penry*, for example, the Court first determined that the prisoner's claim rested on a rule of law that this Court had established in holdings delivered prior to the conclusion of direct review. Then, as an independent matter, the Court took up the prisoner's contention that the "old" rule of law had been violated "*in his particular case*." *Penry*, *supra* at 318 (emphasis in original).[11]

To be sure, a federal court's application of an "old" rule to the facts of a particular case can sometimes be virtually submerged in the initial determination whether the prisoner's claim can sensibly be said to rely on the "old" rule at all. If the facts of the prisoner's case range significantly beyond the facts of the cases in which this Court announced the "old" rule, there may be a nice question whether he has a chance of succeeding on the merits only if the "old" rule is altered into something "new." Problems of this sort are worked out when a habeas court determines the content of the "old" rule at the correct level of generality. If, once the rule is properly articulated, the prisoner has no reasonable chance of succeeding when that rule is applied to his case, the court may conclude that his claim does not rest on the "old" rule after all and thus is *Teague*-barred.

Yet the existence of hard cases does not alter the nature of the *Teague* inquiry as a search for the "old" legal

[11] *Accord Roe v. Flores-Ortega*, 528 U.S. 470, 485 (2000) (explaining that a rule could be enforced in habeas because it rested on old precedents); *id.* at 487 (finding the record insufficient to determine whether that rule had been violated and remanding for further proceedings below); *Stringer v. Black*, *supra* at 237 (also concluding that a prisoner's claim was not foreclosed by *Teague* and remanding for further proceedings).



rule that properly governs a claim. Most legal doctrines demand difficult judgments when they are implemented at the borderline. The subtleties in some cases conceded, the *Teague* doctrine remains concerned with identifying the rules of law that this Court had established at the time.

### A. The Descriptions On Which The Commissioner And His *Amicus* Rely Appeared Before The Court Turned To The Task Of Reconciling *Teague* With §2254(d)

The descriptions of "old" and "new" rules in *Teague* itself obviously coincided with the announcement of a different approach to the problem presented when rules of law shift over time. The Court did not propose that it had worked out all the details of the new *Teague* doctrine, but rather explicitly disclaimed any "attempt to define the spectrum of what may or may not constitute a new rule . . . ." *Teague*, *supra* at 301.

More importantly, the descriptions in *Teague*, *Butler*, *Parks*, *Sawyer*, and *Stringer* appeared before the enactment of §2254(d). Those descriptions have been repeated without re-examination as part of the introduction with which opinions applying the *Teague* doctrine typically begin. The Court did not face the task of reconciling *Teague* with §2254(d) until *Terry Williams* and *Banks I*, when the Court adopted an understanding of *Teague* that makes sense in light of the new statute.

### B. The Descriptions On Which The Commissioner And His *Amicus* Rely Neglect The Elaboration Of *Teague* In *Wright v. West*

If the Commissioner and his *amicus* are right, *Teague* is no longer a doctrine about the consequences that ensue when rules of federal law change. Instead, *Teague* has evolved into a blanket injunction that federal courts must defer to reasonable state court decisions. That idea invites

attention to *Wright v. West*, *supra*, where the Court entertained the question whether federal habeas courts should discard the practice of examining federal claims *de novo* and, instead, "afford deference to state-court determinations applying law to the specific facts of a case." *Id.* at 284.

Writing for the Court in *West*, Justice Thomas discussed arguments that would support an affirmative answer and, in that context, said that the Court had already "implicitly questioned" the "*de novo*" standard in *Teague* and related cases, especially *Butler*. Justice Thomas stated the *Teague* doctrine this way: "[I]f a state court has reasonably rejected the legal claim asserted by a habeas petitioner under existing law, then the claim seeks the benefit of a 'new' rule under *Butler*, and is therefore not cognizable on habeas under *Teague*." *West*, *supra* at 291.

Concurring in the judgment in *West*, Justice O'Connor explained that Justice Thomas' opinion "mischaracterize[d]" *Teague*. *West*, *supra* at 303 (O'Connor, J., concurring in the judgment). The *Teague* doctrine, she explained, creates no "deferential standard of review" to be applied to state court decisions applying "old" rules. *Id.* at 303-04. By contrast, *Teague* prevents federal habeas courts from giving prisoners the benefit of "new" rules. *Id.* The *Teague* doctrine "simply requires that a state conviction . . . be judged according to *the law in existence* when the conviction became final." *Id.* at 304 (emphasis added).

Justice O'Connor further explained in *West* that in order to determine what counts as a "new" rule, "*Teague* requires courts to ask whether the rule . . . can be meaningfully distinguished from that established by *binding precedent* at the time [the] conviction became final." *Id.* (emphasis added). Justice O'Connor acknowledged that the Court had referred to the reasonableness of a previous state court decision. Yet she explained that statements of that kind



only mean that the question whether a rule is "new" is determined on an "objective standard." And "[i]f a proffered factual distinction between the case under consideration and pre-existing precedent does not change the force with which *the precedent's underlying principle* applies, the distinction is not meaningful, and *any deviation from precedent* is not reasonable." *Id.* (emphasis added).

The CJLF argues that its understanding of *Teague* can be "distilled" from Justice O'Connor's account in *West*. Brief of Amicus Curiae, CJLF, at 3. Yet the CJLF actually asks the Court to depart from Justice O'Connor's analysis by "drop[ping]" her caveat that any proposed distinction between a recent precedent and previous decisions must be "meaningful." *Id.* at 11. To its credit, the CJLF does not propose that the Court should rest on a meaning*less* distinction. But the CJLF *does* contend that a recent precedent announced a "new" rule if there is any "*arguably material* factual distinction" between that precedent and previous cases. *Id.* (emphasis in original).[12]

The CJLF acknowledges that the purpose of its proposed amendment to Justice O'Connor's analysis is to conform her account of *Teague* to the CJLF's own. Here again, the CJLF insists that if "reasonable jurists *could* conclude" that a recent precedent deviates from the decisions that were in place when a case was subject to direct review, the precedent must necessarily announce a "new" rule. *Id.* at 7. But that is precisely the view that Justice O'Connor rejected. She explained that while a state court's treatment of a claim is "especially valuable," it does not follow that "a

[12] This formulation confuses *Teague* with the "contrary to" clause in paragraph (1) of §2254(d). See *Terry Williams*, *supra* at 406 (explaining that a state court decision fails the "contrary to" test if the state court's result is different from the result the Court itself reached in a prior case in which the facts were "materially indistinguishable").

state court's *incorrect* legal determination has ever been allowed to stand because it was *reasonable*." *West*, *supra* at 305 (O'Connor, J., concurring in the judgment) (emphasis added).

In another separate opinion in *West*, Justice Kennedy dismissed any suggestion that "the *Teague* line of cases is on a collision course" with cases holding that a state court's application of existing law to the facts of a particular case is open to *de novo* examination in federal habeas. *West*, *supra* at 306 (Kennedy, J., concurring in the judgment). Justice Kennedy acknowledged that "the fact that [the] standard for distinguishing old rules from new ones turns on the reasonableness of a state court's interpretation of then existing precedents suggests that federal courts do in one sense defer to state-court determinations." *Id.* at 307. He explained, however, that "the purpose of the reasonableness inquiry where a *Teague* issue is raised . . . is to determine whether application of a new rule would upset a conviction that was obtained in accordance with *the constitutional interpretations existing* at the time." *Id.* (emphasis added). This is the best understanding of the idea that *Teague* "validates reasonable, good-faith *interpretations of existing precedents* made by state courts even though they are shown to be contrary to later decisions."[13] State courts are supposed to follow the rules this Court has laid down. If state courts do that, federal habeas courts will not change the rules later.

Justice Kennedy recognized that federal habeas law sometimes serves a "comity interest" by "saying that since the question is close the state-court decision ought to be deemed correct because [federal courts] are in no better position to judge." *West*, *supra* at 308 (Kennedy, J., concurring in the judgment). But that is "not the comity

[13] *Butler*, *supra* at 414 (emphasis added).



interest that underlies *Teague*." Instead, "[t]he comity interest served by *Teague* is in not subjecting the States to a regime in which finality is undermined by our changing a rule once thought correct but now understood to be deficient on its own terms." *Id.* And "[i]t is in recognition of this principle that [federal habeas courts] ask whether the decision in question was dictated by precedent." *Id.*

In yet another separate opinion in *West*, Justice Souter also clarified *Teague's* role in the mix of doctrines and statutes governing federal habeas corpus. He explained that "[t]he crux of the analysis when *Teague* is invoked . . . is identification of the rule on which the claim for habeas relief depends." *West*, *supra* at 311 (Souter, J., concurring in the judgment). If that rule is "'old' enough to have predated the finality of the prisoner's conviction, and specific enough to dictate the rule on which the conviction may be held unlawful," the claim can be entertained in federal court. *Id.*

Four years after *West*, Congress enacted AEDPA, which extinguished any possibility that *Teague* might yet mutate into a general rule of deference to reasonable state decisions on the merits of federal claims. This Court explained in *Terry Williams*, *supra*, that Congress addressed the debate within the Court in *West* and drew the very distinction that Justice O'Connor had identified between an "*incorrect* or *erroneous*" state court application of federal law, on the one hand, and an "*unreasonable*" application of federal law, on the other. *Terry Williams*, *supra* at 412 (opinion for the Court by O'Connor, J.) (emphasis in original). That distinction, in turn, differentiated the separate spheres in which *Teague* and the statute function. Congress maintained *Teague* as a door-keeping doctrine that limits federal habeas to claims based on "old" rules and located attention to the reasonableness of prior state court decisions in §2254(d), which governs the subsequent question whether relief can be awarded with respect to claims that *Teague*

allows federal courts to entertain.

### C. The Descriptions On Which The Commissioner And His *Amicus* Rely Need Not Be Read The Way The Commissioner And His *Amicus* Read Them

The descriptions on which the Commissioner and his *amicus* rely do not demand the problematic interpretation that the Commissioner and his *amicus* ascribe to them. Instead, read carefully and in context, those descriptions lend themselves to an interpretation more in keeping with *Terry Williams* and *Banks I*.

The Commissioner and his *amicus* argue, for example, that the "result" in a case was "dictated by precedent" if that result constituted the only reasonable judgment available in the particular circumstances presented. That is scarcely the most sensible, far less the only, understanding of the "dictated by precedent" phrase.

The Court has made it clear that a rule is "old" for *Teague* purposes if the rule itself (not the result of its application in a particular case) was "dictated by precedent." *Penry*, *supra* at 319 (explaining that the rule on which the prisoner relied was "old" because it was dictated by prior decisions); accord *Parks*, *supra* at 488 (explaining that in *Teague* the Court "defined a new rule as a rule . . . that was not '*dictated* by precedent'") (emphasis in original).

The "dictated by precedent" phrase may only distinguish the two ways in which a court commonly invokes pre-existing authority. On the one hand, a court may seek guidance from precedents under the familiar rubric of *stare decisis*. Where that is true, the rule of law the court articulates (as well as the result it reaches in the case at hand) may contribute to the evolution of the law. On the other hand, a court may invoke precedents in the much harder sense that it follows the rules of law established



authoritatively by their holdings. It is where that is true that it is most natural to say that the rule the court identifies (and, for that matter, the result it reaches) are "dictated by precedent."[14]

When this Court has established a rule of federal law in a holding, lower courts (state and federal) do not treat that rule as a guide in analogous cases in the comparatively loose sense of *stare decisis*. They embrace it as the authoritative law of the land, laid down by this Court which sits at the top of the judicial hierarchy as the ultimate arbiter of the meaning of federal law. *Rodriguez de Quijas v. Shearson/American Express,* 490 U.S. 477, 484 (1989). Accordingly, a rule is "old" if it operates on lower courts not as a guide in the *stare decisis* sense, but rather as this Court's authoritative articulation of federal law to which lower courts are duty-bound to adhere.

The argument that a rule is "old" for *Teague* purposes only if it dictated a result favorable to the prisoner in a particular case necessarily faces yet another obstacle. It blurs the familiar distinction between questions of pure law, on the one hand, and mixed questions of law and fact (the application of law to particular facts) on the other. It thus attacks the very proposition on which *Teague* is founded: the proposition that rules of law announced by this Court *exist*, that they have real meaning in the world, and that they must be followed until they are changed.

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[14] The Court has drawn this very distinction in explaining the difference between cases that come to this Court itself in collateral proceedings (and thus are subject to *Teague*) and cases that arrive here on direct review (where *stare decisis* provides the guide). *Johnson v. Texas*, 509 U.S. 350, 352-53 (1993) (explaining in a direct review case that *Teague* was inapplicable but the Court would look to past precedents with "customary respect for the doctrine of *stare decisis*").

Obviously, the *Teague* doctrine contemplates that a rule of law must be identified at a sensible level of generality. Articulating "old" law in an excessively abstract way would defeat *Teague* altogether—by admitting claims genuinely based on a wide variety of discrete rules under cover of an overarching rule defined broadly enough to subsume them all. Equally, articulating "old" law in an excessively fact-specific manner would also defeat *Teague*—by foreclosing claims based on rules of law as they were defined authoritatively in this Court's precedents.

A rule of law necessarily has *some* field of operation apart from its implications for a particular fact pattern. If it didn't, it wouldn't be a rule.[15] The *Teague* doctrine requires a federal habeas court to identify the rule on which a prisoner's claim depends and to identify that rule at the right level of generality. The CJLF conceives that the *right* level of generality is always the *lowest* level: a description of the disposition of a particular dispute in light of the material facts. That does not follow at all. The task is to identify an "old" rule at the *accurate* level, the *correct* level, the level that captures the rule's true authoritative content.

The CJLF asks the Court to rely on classic accounts of the narrowest way that a common law decision can be understood.[16] That line of analysis is entirely inapposite in this context, where the question is the meaning of this Court's decisions announcing rules of constitutional law.

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[15] In *Yates v. Aiken*, 484 U.S. 211 (1988), for example, the Court held that a recent case had not announced a "new" rule but merely applied "the principle that governed" a previous case decided before a prisoner's conviction and sentence had become final. *Id.* at 216-17; *Penry*, *supra* at 314.

[16] Brief of Amicus Curiae, CJLF, at 6-7 (citing Arthur L. Goodhart, *Determining the Ratio Decidendi of a Case*, 40 Yale L.J. 161 (1930)).



This Court selects cases for review not merely to correct errors below, nor to do justice to the immediate parties, but rather to use the cases it picks as vehicles for elaborating authoritative federal law. The CJLF's proposal to limit the rules announced in holdings to a recitation of the Court's results in light of the material facts fails to appreciate the Court's role as the final arbiter of the Constitution's meaning.[17]

This Court obviously cannot revisit constitutional problems very often. When it selects a particular case for review, accordingly, the Court does not simply reach a disposition on the facts of that case and leave lower courts to deduce the rule of law they are to follow in future cases. Instead, the Court typically articulates rules in a sharper, clearer (rule-like) manner, which facilitates understanding and effective implementation.[18] Those are the rules of law announced in this Court's holdings and, accordingly, they are the "old" rules on which prisoners can rest in federal collateral proceedings.

In some instances, the Court articulates rules at a fairly specific level of generality. A rule of that kind cannot be applied in a wide range of circumstances without periodic adjustments in its content. In other instances, the Court articulates rules at a relatively high level of generality. A rule of that kind can be (and is meant to be) invoked in different factual contexts without producing a change in the rule itself.

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[17] Even in the common law context, Professor Goodhart disclaimed the notion that a "judge who writes an opinion will be wasting both his own time and ours." *Id.* at 168. Goodhart did not propose that the rules of law stated in judicial opinions should be ignored, only that they should be read carefully and in context.

[18] *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175 (1989).

In *West*, *supra*, Justice Kennedy explained that the rule established in *Jackson v. Virginia*, 443 U.S. 307 (1979), fits this description. *West*, *supra* at 308 (Kennedy, J., concurring in the judgment). The rule established by *Strickland*, *supra*, is another illustration. And, as Mr. Banks' brief demonstrates, the rule established by *Lockett*, *supra*, and related decisions is yet another.

Nothing in *Teague* vanquishes the familiar distinction between a rule of law itself and the application of that rule in a particular instance.[19] The Court has said that "gradual developments" can constitute "new" rules, *Sawyer*, *supra* at 234, and that a rule can be extended into something "new" if it is applied in a truly "novel setting." *Stringer*, *supra* at 228. But those observations must be read in context.[20] The Court has scarcely held that *Teague* automatically prevents federal courts from applying "old" rules to different fact patterns in the run of cases. The "[o]ne *general* rule that has emerged under *Teague* is that application of existing precedent in a new factual setting will *not* amount to announcing a new rule." *Graham*, *supra* at 506 (Souter, J., dissenting) (emphasis added) (explaining that a prisoner need not "point to an old case decided on facts identical to the facts of his own case") (quoting *West*, *supra* at 313 (Souter, J., concurring in the judgment)).

[19] *Cf. INS v. St. Cyr*, 533 U.S. 289, 300-08 (2001); *Miller v. Fenton*, 474 U.S. 104, 113-14 (1985).

[20] In *Sawyer*, the Court was only explaining that federal habeas is not a "mechanism for the continuing reexamination of final judgments based upon later emerging doctrine." *Sawyer*, *supra* at 234. In *Stringer*, the Court was only explaining that *Teague* bars a habeas court from itself fashioning a "new" rule and then applying that rule to a claim.



### D. The Descriptions On Which The Commissioner And His *Amicus* Rely Played No Significant Role In The Cases In Which The Court Has Actually Decided Whether Claims Can Be Considered

The descriptions of "old" and "new" rules on which the Commissioner and his *amicus* rely have had little or nothing to do with this Court's analysis of actual *Teague* cases. Certainly, the understanding of *Teague* that the Commissioner and the CJLF urge the Court to adopt cannot be squared with those cases. The CJLF admits as much. According to the CJLF, it is "not surprising" that the Court has typically found rules to be "new." Brief of Amicus Curiae, CJLF, at 12. Cases usually reach this level only when there is a divergence of opinion below, and since most disagreements between lower courts are reasonable the Court knows that a rule is "new" before it begins its analysis. *Id.*

This proves too much. If the CJLF is right, this Court has engaged in a charade whenever it has purported to grapple with the question whether a rule is "old" or "new" for *Teague* purposes. Any rule that gets this far must be "new" or lower courts wouldn't be arguing about it. As though to underscore the point, the CJLF insists that two cases in which the Court found a rule not to be "new" (*Penry* and *Stringer*) can be justified only in ways the CJLF finds dissatisfying and thus probably should be overruled. Brief of Amicus Curiae, CJLF, at 12-16.

There is a reason why the CJLF cannot explain this Court's *Teague* decisions. The CJLF contends that a rule of law can have only the uncontestable content reflected in its application to a particular set of facts. Accordingly, the CJLF cannot comprehend how justices of this Court might engage in a sensible debate about that content. But justices of the Court obviously *can* debate the content of a rule. That debate

takes the form of arguments about the correct level of generality at which a rule of law established by prior holdings should be understood.

The CJLF looks back at this Court's cases implementing *Teague* and conceives that the question was whether a prisoner's claim might reasonably have been rejected in light of the rule of law established by relevant holdings. If so, according to the CJLF, the claim depended on a "new" rule and could *not* be entertained in federal habeas. That understanding is precisely backward. The question in those cases was first and foremost the accurate level of generality at which relevant holdings established a rule of law. Once an "old" rule was correctly articulated, a prisoner's claim *could* be entertained if it fairly depended on that "old" rule—that is, if there was a reasonable argument that the claim would prove to be meritorious when the "old" rule was applied to the circumstances of the prisoner's case. Whether the claim in a particular case was meritorious when judged against an "old" rule was another question (the merits). And whether federal habeas relief might yet be barred because a previous state decision on the merits was not unreasonable (the question assigned to §2254(d)), was yet another.

In some cases, the Court found the correct level of generality easy to identify. In *Terry Williams*, for example, all members of the Court agreed that the applicable "old" rule of law was the rule established by *Strickland*, *supra*. That rule was not simply a statement of the result the Court had reached on the facts of *Strickland* itself. Instead, the "old" rule in *Strickland* was the doctrinal rule the Court announced to govern that case and other cases in the future.[21] In other

[21] Of course, the Court has allowed habeas courts to entertain claims based on the general doctrine announced in *Strickland* on numerous occasions. This, notwithstanding that when the Court applied that doctrine to the fact pattern in *Strickland* itself, the Court concluded that the prisoner's claim was without merit. If the rule for which *Strickland* stands were limited to the result in that case in light of the material facts, it would follow that *Strickland* announced no rule of law at all that might be useful to any other petitioner and, accordingly, that all the cases in which the Court has allowed claims depending on *Strickland's* doctrine were misconceived.



instances, members of the Court were sharply divided over the most accurate articulation of the "old" rule for which its relevant holdings stood. E.g., *Gilmore v. Taylor*, 508 U.S. 333 (1993); *Gray v. Netherland*, 518 U.S. 152 (1996). Here again, hard cases at the margin have arisen, and some of them have come here for resolution. Yet the core point of the *Teague* analysis has never varied. A federal court entertaining a case in a collateral review posture considers a claim if it fairly rests on a rule of law, correctly understood, found in this Court's holdings before the prisoner's conviction and sentence became final.

We do not deny that some descriptions of *Teague* may have obscured *Teague's* character and function and provided the Commissioner and his *amicus* with rhetorical fodder for their argument that *Teague* bars a claim from federal habeas unless it would have been unreasonable to reject it when a case was still subject to direct review. But we do deny that the Court has actually transformed *Teague* in that way and, in so doing, has defied Congress' decision to attend to the reasonableness of a previous state court judgment at the relief stage of the process in federal court.

In short, there is a way to reconcile *Teague* and §2254(d) that respects the framework that Congress established in AEDPA and brings coherence to the law. In stark contrast, the Commissioner and his *amicus* urge the Court to adopt an understanding of *Teague* that cannot be squared with AEDPA, with this Court's own account of *Teague* in *Terry Williams* and *Banks I*, or with key decisions on what counts as an "old" or "new" rule.

## CONCLUSION

For the reasons stated above and in the brief by Mr. Banks, the Court should affirm the judgment below.

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